ORDER OF THE PRESIDENT
20 February 2017

(Statute of limitations – Integrity of the Court – Denial of request for accelerated procedure)

In Case E-21/16,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Fürstliches Obergericht (Princely Court of Appeal) of Liechtenstein, in the case between

Pascal Nobile

and

DAS Rechtsschutz-Versicherungs AG

concerning the interpretation of the Agreement on the European Economic Area, in particular Article 3 thereof, and the interpretation of Article 201(1)(a) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II),

THE PRESIDENT

makes the following

Order

I Facts and procedure

1 By a letter of 20 December 2016, registered at the Court on the same day, the Princely Court of Appeal of Liechtenstein made a request for an Advisory Opinion in a case pending before it between Mr Pascal Nobile and DAS Rechtsschutz-Versicherungs AG ("DAS"). The case before the national court concerns the interpretation of Article 3 of the Agreement on the European Economic Area ("EEA" or "the Agreement") and Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (the "Solvency II Directive") as

adapted to the EEA Agreement by Decision No 78/2011 of 1 July 2011 of the EEA Joint Committee (OJ 2011 L 262, p. 45, and EEA Supplement No 54, p. 57).

2 Mr Nobile, the Appellant, held a policy for legal expenses insurance with DAS, the Respondent. Article 19(2) of the Policy's terms and conditions provides: '*The insured person shall leave the conduct of the case exclusively to DAS. Without prior consent of DAS, the insured person shall not instruct any attorneys, experts, etc., nor shall he commence proceedings, take any legal steps, or agree to any settlements. The insured person shall not enter into any fee agreement with the instructed attorney*.'

3 With effect from 1 September 2014, Mr Nobile rented a single-family home in Eschen, for which he provided a deposit. With effect from 30 September 2015, the landlady terminated the tenancy agreement. It is alleged that the property suffers from mould. In this regard, legal advice was sought from DAS. Following correspondence between DAS and the landlady, the landlady informed DAS that while the deposit would be repaid, deductions would be made for the costs of water and community fees. On 18 November 2015, Mr Nobile's wife informed DAS that the landlady had returned the deposit, save for the abovementioned deductions.

4 Subsequently, Mr Nobile provided his current lawyer, Mr Falkner, who works in Liechtenstein, with a power of attorney with a view to bringing legal proceedings against the landlady seeking repayment of the elements of the deposit withheld, and a retrospective rent reduction. He did not, however, inform DAS of this in advance.

5 By a letter of 2 December 2015, Mr Falkner wrote to DAS requesting coverage of the costs of the legal proceedings. DAS refused that request. Subsequently, Mr Nobile initiated proceedings against DAS before the Princely Court (Fürstliches Landgericht). He sought a declaration that, under his legal expenses insurance policy, DAS was liable to provide legal expenses insurance cover in respect of the proceedings against the landlady and that the insurance policy covered those legal proceedings. The Princely Court dismissed the action. In its reasoning, the Princely Court held that the exclusive right of DAS to conduct a case, as had been agreed in the general terms and conditions of insurance, was compatible with Article 60 of the Liechtenstein Insurance Contracts Act (Versicherungsvertragsgesetz). Article 60 of the Liechtenstein Insurance Contracts Act implements Article 201(1)(a) of the Solvency II Directive in national law. The provision concerns the free choice of a lawyer. Mr Nobile brought an appeal against that judgment before the Princely Court of Appeal.

6 On 1 December 2016, upon a proposal of the Norwegian Government, the Governments of the EFTA States issued ESA/Court Committee Decision No 5 of 1 December 2016. By this Decision, the EFTA States decided to re-appoint the incumbent Norwegian Judge Per Christiansen for a period of three years with effect from 17 January 2017. According to the Decision's recitals, Judge Christiansen's appointment was stated as being "for a non-renewable term of three years, until he reaches the age of 70, which is the statutory

retirement age for Norwegian Supreme Court Judges" and the decision itself as being "without prejudice to the term of office of any judge who may be reappointed in the future".

7 On 4 December 2016, seven Norwegian academics lodged a complaint with the EFTA Surveillance Authority ("ESA") against ESA/Court Committee Decision No 5 of 1 December 2016, asserting that it breached the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"). Following the complaint, ESA treated the matter as a priority and requested information of the Governments of the EFTA States.

8 In its request of 20 December 2016, the Princely Court of Appeal referred three questions to the Court. The first two seek to clarify requirements of substantive EEA law concerning the free choice of lawyer provided for in Article 201(1)(a) of the Solvency II Directive.

9 The third question concerns the interpretation of Article 3 EEA. This question raises, in essence, the issue whether, from 17 January 2017, the Court would be lawfully composed in a manner which ensures its independence and impartiality. The third question reads as follows:

> *In the event that questions 1 and 2 are answered after 16 January 2017:*
>
> *a) Does the principle of loyalty laid down in Article 3 of the EEA Agreement preclude national courts, in all circumstances, from calling the validity of decisions of the EFTA Court into question?*
>
> *b) In the event that question 3a is answered in the negative: Which circumstances would allow national courts to question the validity of decisions of the EFTA Court, without thereby being in breach of the principle of loyalty laid down in Article 3 of the EEA Agreement?*

10 The referring court states that the grounds for raising this question are, inter alia, as follows:

> *... the judge of the EFTA Court, Mr Per Christiansen, has been reappointed with effect from 17 January 2017, but only for a three-year term of office. However, Article 30(1) of the Surveillance and Court Agreement (SCA) provides that the Judges of the EFTA Court are appointed by common accord of the Governments of the EFTA States for a term of six years.*
>
> *…*
>
> *This raises the question, if, in the event the EFTA Court only issues its advisory opinion with respect to questions 1 and 2 after 16 January 2017, any such advisory opinion, issued according to Article 34 SCA, and constituting a decision of the EFTA Court, would even be valid for the purposes of Article 29 SCA.*

11 On the same date, *Norges Juristforbund*, the Norwegian Judges' Association, wrote an open letter to the Norwegian Government expressing its concerns regarding ESA/Court Committee Decision No 5 of 1 December 2016.

12 On 22 December 2016, the Princely Court of Appeal submitted a request to the Court for an accelerated procedure to be applied in this case, pursuant to Article 97a of the Rules of Procedure ("RoP"). As regards the first two questions, the request refers to the fact that, in the national proceedings, Mr Nobile had indicated his need for a speedy resolution of the matter. The request states further that Mr Nobile urgently requires the insurance cover claimed in order to pursue the legal matters affected by it, as well as to avoid any negative consequences, such as the possibility of the claim becoming statute barred or to prevent evidence for subsequent proceedings from being lost. DAS, too, in its previous submissions, had informed the national court that it was not least in Mr Nobile's interest to obtain legal certainty as soon as possible. Finally, the Princely Court of Appeal made reference to the Order of the President of 30 September 2014 in Case E-18/14 *Wow air ehf* [2014] EFTA Ct. Rep. 1304.

13 As regards the third question referred, the national court stated:

> *If the decisions of the EFTA Court (and accordingly also advisory opinions issued pursuant to Article 34 SCA) were invalid, due to the circumstances raised in the request, and if the referring court was entitled to address this, the request for a preliminary decision would, in any event, be irrelevant for the appeal proceedings in respect of questions 1 and 2, and would only constitute an unnecessary delay of the proceedings. Thus, it is imperative also with regard to the questions referred to at point 3 of the request that they are dealt with by way of accelerated procedure, in accordance with Article 97a of the Rules of Procedure, which is hereby expressly requested.*

14 On 11 January 2017, the Court ruled that the third question referred was to be addressed separately as a preliminary matter in the form of a decision. The President and Judge Per Christiansen were recused for that part of the case (see Decision of the Court of 14 February 2017 in Case E-21/16 *Nobile*, paragraph 11). They were replaced by ad hoc Judges Martin Ospelt and Siri Teigum respectively, pursuant to the fourth paragraph of Article 30 SCA. In the respective proceedings, the two ad hoc judges sat together with Acting President Páll Hreinsson.

15 On 13 January 2017, the ESA/Court Committee adopted Decision No 1 of 2017 on the re-appointment of a Judge to the EFTA Court. ESA/Court Committee Decision No 5 of 1 December 2016 was repealed and Per Christiansen was unconditionally re-appointed as a Judge of the Court under the terms of the SCA for a period of six years with effect from 17 January 2017. The new Decision did not set out any reasons why ESA/Court Committee Decision No 5 of 1 December 2016 was repealed and replaced.

16 On 14 February 2017, the Court rendered its Decision in Case E-21/16 *Nobile*. It held in paragraphs 16 to 23 of this Decision:

> *16. Any assessment of the lawfulness of the Court's composition, particularly concerning its independence and impartiality, requires that due account is taken of several important factors. First, the principle of judicial independence is one of the fundamental values of the administration of justice. This principle is reflected, inter alia, in Articles 2 and 15 of the Statute of the Court and Article 3 RoP. Second, it is vital not only that judges are independent and fair, they must also appear to be so. Third, maintaining judicial independence requires that the relevant rules for judicial appointments, as set out in Article 30 SCA, must be strictly observed. Any other approach could lead to the erosion of public confidence in the Court and thereby undermine its appearance of independence and impartiality.*
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> *17. The ESA/Court Committee decided on 1 December 2016 to re-appoint Judge Per Christiansen for a non-renewable period of three years with effect from 17 January 2017. It was this event that led the referring court to raise the third question, since the first paragraph of Article 30 SCA provides that Judges shall be appointed for a term of six years.*
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> *18. The preamble to ESA/Court Committee Decision of 1 December 2016 does not explain why a reference is made in the recitals to the statutory retirement age for Norwegian Supreme Court Judges. The SCA and the Statute of the Court do not contain a corresponding provision.*
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> *19. The statement in the recitals of the ESA/Court Committee Decision of 1 December 2016 that the decision "is without prejudice to the term of office of any judge who may be reappointed in the future" raises questions whether the original decision to re-appoint Judge Christiansen was made on an objective basis.*
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> *20. Most importantly, the ESA/Court Committee Decision of 1 December 2016 did not address the grounds on which a term of three years could be reconciled with Article 30 SCA, which expressly provides for a term of six years, both for the appointment and the re-appointment of a Judge. This term aims at protecting the independence of the Judges.*
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> *21. Irrespective of those considerations, the Court must take account of ESA/Court Committee Decision 2017 No 1 of 13 January 2017, which repealed the ESA/Court Committee Decision of 1 December 2016 and re-appointed Judge Per Christiansen for a term of six years. The new decision is unambiguous and provides for a term that is in accordance with Article 30 SCA. Consequently, there can be no doubt as to the lawfulness of the Court's composition from 17 January 2017.*

22. It follows that, after this decision has been rendered, the substantive part of the present proceedings, namely the first two questions referred, may be addressed by the Court's three regular Judges.

23. The Court therefore concludes that, from 17 January 2017, it is lawfully composed in a manner that ensures its independence and impartiality.

II Findings

17 Article 97a(1) RoP provides that at the request of the national court the President may exceptionally decide, on a proposal from the Judge Rapporteur, to apply an accelerated procedure derogating from the provisions of these Rules to a reference for an advisory opinion, where the circumstances referred to establish that a ruling on the question put to the Court is a matter of exceptional urgency. In that event, the President may immediately fix the date for the hearing, which shall be notified to the parties in the main proceedings and to the other persons referred to in Article 20 of the Statute when the decision making the reference is served (see Order of the President in *Wow air ehf.* cited above, paragraph 6).

18 As a matter of principle, the spirit of cooperation between the Court and the national court speaks in favour of granting the request (see Order of the President in *Wow air ehf.* cited above, paragraph 7).

19 However, having heard the Judge Rapporteur, the President, pursuant to Article 97a(1) RoP, has decided not to apply an accelerated procedure, on the basis that a ruling on the questions referred is not a matter of exceptional urgency, for the reasons set out below.

20 As regards the first two questions referred by the Princely Court of Appeal, the circumstances are not such as to constitute a matter of exceptional urgency. The underlying case concerns insurance cover for the legal expenses in a tenancy dispute. Although the issue whether the Appellant is entitled to a free choice of lawyer pursuant to Article 201(1)(a) of the Solvency II Directive is certainly important, the outcome of this case – whatever it may be – will in all probability not prevent the Appellant from pursuing an action against the landlady.

21 The third question, whether the Court is lawfully composed from 17 January 2017 onwards, would, however, in principle, be a matter of exceptional urgency because it touches upon the Court's integrity.

22 There are indications that the nomination of Judge Christiansen for an abridged term by the Government of Norway was not free of political considerations. (See the description of events and the conclusions of Mads Andenæs and Halvard Haukeland Fredriksen in their article "EFTA-domstolen under press", forthcoming in *Europarättslig tidskrift* No 1 2017.)

23 In Europe, concerns as to the independence of adjudicating bodies have recently been voiced in public debate and the utmost importance attached to the guarantees securing the independence of adjudicating bodies has been addressed in judicial proceedings on several occasions (compare, for example, the judgment in *Commission* v *Hungary*, C-288/12, ECLI:EU:C:2014:237; *Commission* v *Hungary*, C-286/12, EU:C:2012:687; and the Order of the President in the same case, applying an expedited procedure: EU:C:2012:469; see also the judgments of the European Court of Human Rights of 23 June 2016 in *Baka v. Hungary*, Application no. 2061/12, and 9 June 1998 in *Incal v. Turkey*, Application no. 22678/93).

24 The provisions of the EEA Agreement are, to a great extent, intended for the benefit of individuals and economic operators throughout the European Economic Area. Therefore, the proper functioning of the Agreement is dependent on those actors being able to rely on the rights intended for their benefit (see Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraph 58). Accordingly, Article 108(2) EEA provides that the EFTA States shall establish a court of justice. This is not only important for individuals and economic operators of the EFTA States, but also, on a reciprocal basis, for their counterparts in the EU Member States.

25 Consequently, the Court assumes an essential role in the EEA legal order and the proper composition of the Court is key to the observance of the rights and obligations flowing from the EEA Agreement. Without an independent court, the purpose of the Agreement would be rendered nugatory and the EFTA States would fail to safeguard the protection of the rights of individuals and economic operators. To maintain the independence of the judiciary is not a privilege for judges, but a guarantee for the respect of these rights and a bulwark of the democratic order.

26 The first and second paragraphs of Article 30 SCA provide that the judges to the Court shall be appointed or re-appointed for a term of six years. This six-year term is mandatory and constitutes a minimum protection of judicial independence. It is an essential part of the judicial constitution (known in German as *Gerichtsverfassung*) of the EFTA pillar. The right to a six-year term cannot be waived by individual judges.

27 Therefore, any doubts raised as to the independence or impartiality of the Court demand swift resolution in order to ensure the proper functioning of the EEA Agreement and in particular the respect for its fundamental principles.

28 However, the consequences of the Court's findings in its Decision of 14 February 2017, as set out in paragraph 16 above, are such that the circumstances that existed when the national court lodged its request for an accelerated procedure no longer exist.

29 As a result, the request to apply an accelerated procedure, pursuant to Article 97a RoP, derogating from the provisions of the Rules of Procedure to a reference for an advisory opinion is denied.

On those grounds,

THE PRESIDENT

hereby orders:

The request to apply an accelerated procedure, pursuant to Article 97a of the Rules of Procedure, derogating from the provisions of the Rules of Procedure to a reference for an advisory opinion is denied.

Gunnar Selvik
Registrar

Carl Baudenbacher
President